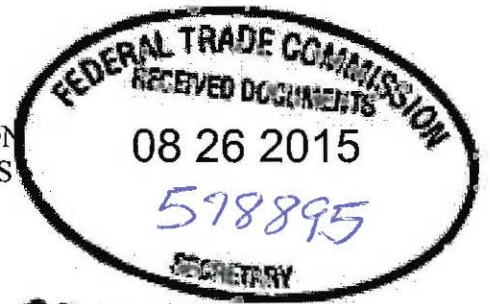


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



\_\_\_\_\_)  
In the Matter of )  
)  
LabMD, Inc., )  
a corporation, )  
Respondent. )  
\_\_\_\_\_)

PUBLIC  
Docket No. 9357

ORIGINAL

**COMPLAINT COUNSEL’S OPPOSITION TO  
RESPONDENT’S MOTION TO ACCORD PORTIONS OF  
COMPLAINT COUNSEL’S POST-TRIAL BRIEFING IN CAMERA TREATMENT**

More than a year after Respondent was first obligated to identify information for which it would seek *in camera* treatment, and long after the evidentiary record has closed, Respondent now asks this Court to treat as *in camera* Complaint Counsel’s statements [REDACTED] [REDACTED].<sup>1</sup> These statements do not constitute evidence for which *in camera* treatment could ever be appropriate. Moreover, Respondent has failed to carry its burden by submitting an affidavit or declaration demonstrating that the disclosures it seeks to prevent will result in a clearly defined, serious injury. Finally, Respondent’s Motion seeks the result of

\_\_\_\_\_  
<sup>1</sup> As set forth in this Response, Complaint Counsel maintains that Respondent’s Motion to Accord Portions of Complaint Counsel’s Post-Trial Briefing In Camera Treatment fails. In the event that the Court disagrees with Complaint Counsel’s position, however, Complaint Counsel’s Response redacts the information Complaint Counsel believes Respondent is seeking to protect through its Motion. [REDACTED]

protecting information that it has already made public. For all of these reasons, Respondent's Motion fails.

**BACKGROUND**

Respondent's [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Complaint Counsel did not oppose

Respondent's motion.

Respondent's [REDACTED] followed numerous discussions, including colloquy before this Court, regarding the evidentiary status of information [REDACTED]. Complaint Counsel repeatedly invited Respondent to identify the information it sought to protect with an *in camera* order, specifically noting that "absent an order of the Court, Complaint Counsel will be constrained from redacting information [REDACTED]. Letter from L. VanDruff to W. Sherman (June 10, 2015) (confidential for the purposes of this filing), attached as Exhibit A.

[REDACTED]

[REDACTED]

---

<sup>2</sup> [REDACTED]

<sup>3</sup> [REDACTED]

[REDACTED]

[REDACTED] did not seek to protect any of this information. In short, Respondent's counsel elicited testimony concerning the [REDACTED] [REDACTED] on direct examination in open court, Respondent's principal testified about the [REDACTED] repeatedly, and Respondent submitted documents containing that information in public filings and in public discovery responses. On none of these occasions – where Respondent sought to use the [REDACTED] – did Respondent's counsel seek *in camera* treatment or other protections. Now, however, when Complaint Counsel addresses this material fact in its submissions to the Court, Respondent cries foul and seeks for the first time to conceal this fact from the public.

Respondent's instant Motion seeks to require Complaint Counsel to file amended confidential versions of its Post-Trial briefing, placing *in camera* references to [REDACTED] [REDACTED] Respondent's Motion in this regard apparently seeks permanent *in camera* treatment of such references in Complaint Counsel's post-trial briefing. Notably, Respondent's Motion does *not* seek to place *in camera* any portion of the exhibits underlying those statements in Complaint Counsel's briefing. *See generally*, Resp't's Mot. (Aug. 14, 2015); *see also* Email from W. Sherman to L. VanDruff (Aug. 14, 2015) (memorializing meet-and-confer, stating that Respondent's counsel "did not mention exhibits nor would [he] seek to redact them.") (confidential for the purposes of this filing), attached as Exhibit B.<sup>4</sup>

## ARGUMENT

### I. RESPONDENT'S OUT-OF-TIME MOTION FAILS BECAUSE IT DOES NOT RELATE TO RECORD EVIDENCE

Respondent's Motion fails because it seeks the relief of permanent *in camera* treatment of unspecified portions of Complaint Counsel's post-trial briefing, not record evidence. In this regard, Respondent's Motion is in many ways analogous to the motion rejected by this Court in *In re North Carolina Board of Dental Examiners*. *See* Resp't's Mot. to Prevent Public Posting, *In re North Carolina Board of Dental Examiners*, FTC Docket No. 9343 (Apr. 29, 2011). There, this Court held that where a respondent had not sought *in camera* treatment of information offered into evidence "Complaint Counsel was not, and is not, required to redact information . . . from its Post-Trial Filings." Order on Resp't's Mot. to Prevent Public Posting, at 4, *In re North*

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<sup>4</sup> As the redactions to this filing make clear, if the Court were to grant the relief sought, Complaint Counsel would require additional guidance regarding what information the Court regards to be protected, particularly given the fact that Respondent is not seeking to place *in camera* the exhibits underlying the statements in Complaint Counsel's briefing.

*Carolina Board of Dental Examiners*, FTC Docket No. 9343 (May 16, 2011). The Court's reasoning is equally applicable here, and the Court should deny Respondent's Motion.

Respondent's Motion also fails because, over the course of more than a year, Respondent missed each of three successive deadlines to request *in camera* treatment of the information it apparently now seeks to withhold from the public record. The Court's Revised Scheduling Order provided that the parties file "motions for *in camera* treatment of proposed trial exhibits" by April 22, 2014. Revised Sched. Order at 3 (Oct. 22, 2013). After a protracted delay in the evidentiary hearing, the Court issued a subsequent order providing that "[i]f a party or non-party has material that has been or will be offered into evidence, the deadline for filing a motion for *in camera* treatment is February 24, 2015." Order Setting Deadline for Mot. for *In Camera* Treatment (Feb. 19, 2015). In a later scheduling order relating to the closing of the evidentiary record, the Court set June 8, 2015 as the final deadline by which the parties were to file any remaining motions for *in camera* treatment. Order Reconv. Eviden. Hrng. (June 1, 2015). With respect to [REDACTED], Respondent missed each of those deadlines. Complaint Counsel nonetheless consented to the out-of-time filing of [REDACTED]. [REDACTED] Now, however, all relevant deadlines have passed and the evidentiary record is closed. The Court, Complaint Counsel, and the public are entitled to rely on the representations of Respondent's counsel regarding the information Respondent wished to withhold from the public record, and the Court should reject Respondent's Motion as out-of-time.

## II. RESPONDENT'S MOTION FAILS BECAUSE RESPONDENT HAS NOT MET ITS BURDEN UNDER RULE 3.45

To the extent that the Court construes Respondent's Motion as relating to record evidence rather than to Complaint Counsel's briefing – a position Respondent's counsel expressly

rejects<sup>5</sup> – Respondent’s Motion nonetheless fails because Respondent has not met its burden under Rule 3.45 and related law applying this provision. Respondent bears the burden of demonstrating that evidence for which *in camera* treatment is sought “constitutes sensitive personal information” or that its disclosure “will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting in camera treatment.” Rule 3.45(b).

Respondent’s Motion does not argue – nor could it – that Complaint Counsel’s characterizations of [REDACTED] constitute sensitive personal information. Accordingly, it is Respondent’s burden to establish *with supporting affidavits or declarations*, that the subject of its Motion is “sufficiently secret and sufficiently material to [respondent’s] business that disclosure would result in serious competitive injury.” *In re ECM BioFilms, Inc.*, Docket No. 9358, 2014 FTC LEXIS 189, at \*4-5 (July 23, 2014) (“affidavit or declaration is required”) (citing *In re North Texas Specialty Physicians*, Docket No. 9312, 2004 FTC LEXIS 109, at \*3-4 (Apr. 23, 2004)); see *In re LabMD*, Docket No. 9357 (F.T.C. June 15, 2015), Tr. 1476-77 (“If respondent seeks to withhold [admitted evidence] respondent needs to file a proper motion supported by an affidavit or declaration demonstrating that the documents [meet] the . . . in camera treatment standard . . .”) (reflected in Order Mem. Bench Rulings on Admis. of Evid. & on Resp’t’s Mot. for *In Camera* Treatment, at 2 (June 22, 2015)) . Respondent’s Motion fails in this regard because Respondent’s Motion baldly alleges – without the required supporting affidavit or declaration – that “Complaint Counsel’s disclosure of the [REDACTED] [REDACTED] could result in an injury to Respondent, Respondent’s physician’s [sic] client’s patients, or Michael Daugherty.” Mot. at 1 (emphasis added). This assertion, which relates to

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<sup>5</sup> See Ex. B at 1.

*potential* injuries and which is unaccompanied by any sworn statement, does not meet the standard established by Rule 3.45 and *In re North Texas Specialty Physicians* and its progeny.

Respondent's request for permanent *in camera* treatment also fails because the Commission's Rules of Practice reserve permanent *in camera* treatment only for sensitive personal information. "For in camera material other than sensitive personal information, an expiration date may not be omitted except in unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material . . . is not likely to decrease over time." Rule 3.45(b)(3). Here, Respondent has not only failed to submit affidavits or declarations in support of the relief it seeks, it has made no showing that the need for confidentiality will continue indefinitely.

**III. RESPONDENT SEEKS TO PROTECT INFORMATION THAT IS ALREADY PUBLIC**

Respondent's Motion fails for the additional reason that the information it seeks to protect is already public. As this Court has made clear, "[a]ny material that has previously been made public will not be afforded *in camera* treatment." *In re Promedica Health Sys.*, Docket No. 9346, 2011 FTC LEXIS 70, at \*5 (May 13, 2011) (denying respondent's motion for in camera treatment where documents "have already been disclosed . . . in federal district court proceedings"). Here, Respondent has disclosed the information it seeks to protect in federal district court proceedings. The information Respondent seeks to protect has also been disclosed in this proceeding through Respondent's filings, Respondent's discovery responses, and in the testimony of Mr. Daugherty and third-party witnesses. Tellingly, Respondent's

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED] At no time prior to the filing of Respondent's Motion – including all of the instances when Respondent itself has put the fact in the public record – has Respondent ever sought *in camera* treatment or any other protection for [REDACTED]. Accordingly, the Court should deny Respondent's Motion because the information Respondent seeks to protect is already public.

**CONCLUSION**

For the foregoing reasons, this Court should deny Respondent's Motion.

Dated: August 26, 2015

Respectfully submitted,



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Laura Riposo VanDruff  
Federal Trade Commission  
600 Pennsylvania Ave., NW  
Room CC-8232  
Washington, DC 20580  
Telephone: (202) 326-2999 - VanDruff  
Facsimile: (202) 326-3393  
Electronic mail: [lvandruff@ftc.gov](mailto:lvandruff@ftc.gov)  
*Complaint Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 26, 2015, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-113  
Washington, DC 20580

I also certify that I caused a copy of the foregoing document to be transmitted *via* electronic mail and delivered by hand to:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-110  
Washington, DC 20580

I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

Daniel Epstein  
Patrick Massari  
Erica Marshall  
Cause of Action  
1919 Pennsylvania Avenue, NW, Suite 650  
Washington, DC 20006  
daniel.epstein@causeofaction.org  
patrick.massari@causeofaction.org  
erica.marshall@causeofaction.org

Reed Rubinstein  
William A. Sherman, II  
Sunni Harris  
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801 Pennsylvania Avenue, NW, Suite 610  
Washington, DC 20004  
reed.rubinstein@dinsmore.com  
william.sherman@dinsmore.com  
sunni.harris@dinsmore.com  
*Counsel for Respondent LabMD, Inc.*

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

August 26, 2015

By:



\_\_\_\_\_  
Jayad Brown  
Federal Trade Commission  
Bureau of Consumer Protection

# Exhibit A



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

June 10, 2015

**VIA EMAIL**

William A. Sherman, II  
Dinsmore & Shohl LLP  
801 Pennsylvania Avenue, N.W.  
Suite 610  
Washington, DC 20004

**Re: In the Matter of LabMD, Inc., FTC Docket No. 9357**

Dear Mr. Sherman:

This letter follows our teleconference earlier this afternoon and prior discussions, including on May 18, 2015 and May 27, 2014, regarding the evidentiary status of information regarding [REDACTED].

As you know, during Complaint Counsel's [REDACTED], we did not elicit public testimony regarding [REDACTED]. That information is contained elsewhere within the evidentiary record. It has been Complaint Counsel's understanding for more than a year that Respondent would seek *in camera* treatment of that information, relief that we do not oppose in principle. To date, however, Respondent has not filed a motion to protect information regarding [REDACTED].

As we discussed this afternoon, absent an order of the Court, Complaint Counsel will be constrained from redacting information regarding [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "Laura Riposo VanDruff".

Laura Riposo VanDruff

cc: Reed D. Rubinstein (via email)  
Prashant K. Khetan (via email)  
Daniel Epstein (via email)  
Patrick Massari (via email)  
Erica Marshall (via email)

# Exhibit B

## VanDruff, Laura Riposo

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**From:** Sherman, William <william.sherman@dinsmore.com>  
**Sent:** Friday, August 14, 2015 12:32 PM  
**To:** VanDruff, Laura Riposo  
**Cc:** Brown, Jarad; Rubinstein, Reed; Patrick Massari; Harris, Sunni  
**Subject:** RE: Post Trial Briefings

Laura,

I'm not sure what you're talking about. It's clear you are refusing to take down your briefings. As discussed yesterday we would seek a temporary removal of your briefings, redaction of the mention of the [REDACTED] from your post hearing public filings. I did not mention exhibits nor would I seek to redact them. Pretty simple. If you need to hear that verbally over the phone again, please let me know when we can speak so I can repeat what I said yesterday and comply with the meet and confer requirement. Thank you.

Regards

**Dinsmore**

**William A. Sherman, II**  
Partner

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E william.sherman@dinsmore.com • dinsmore.com

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**From:** VanDruff, Laura Riposo [mailto:lvandruff@ftc.gov]  
**Sent:** Friday, August 14, 2015 12:17 PM  
**To:** Sherman, William  
**Cc:** Brown, Jarad; Rubinstein, Reed; Patrick Massari; Harris, Sunni  
**Subject:** RE: Post Trial Briefings

Thank you for your message, William.

Without knowing the relief that Respondent's anticipated motion would seek – e.g., take down of Complaint Counsel's filings; additional redactions to admitted exhibits that relate to [REDACTED]; removal of [REDACTED] [REDACTED] from the public record – or its bases, we are not in a position to advise Respondent's counsel of our position on any potential motion.

Best regards,

Laura

---

**From:** Sherman, William [mailto:william.sherman@dinsmore.com]  
**Sent:** Friday, August 14, 2015 12:02 PM  
**To:** VanDruff, Laura Riposo  
**Cc:** Brown, Jarad; Rubinstein, Reed; Patrick Massari; Harris, Sunni  
**Subject:** RE: Post Trial Briefings

Laura,

In order to save time I am asking that you agree that our conversation yesterday at which I informed you that we would file a motion to resolve this issue qualifies as a meet and confer. Please advise.

William

**Dinsmore**

**William A. Sherman, II**  
Partner

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E william.sherman@dinsmore.com • dinsmore.com

---

**From:** VanDruff, Laura Riposo [mailto:lvandruff@ftc.gov]  
**Sent:** Friday, August 14, 2015 11:59 AM  
**To:** Sherman, William  
**Cc:** Brown, Jarad; Rubinstein, Reed; Patrick Massari; Harris, Sunni  
**Subject:** RE: Post Trial Briefings

Good morning, William.

I am writing in response to your August 13, 2015 email, which followed a 4:00 PM teleconference, regarding certain characterizations in Complaint Counsel's post-trial briefing regarding [REDACTED]. You requested that Complaint Counsel agree to the take down its post-trial filings so that Respondent's counsel could identify the locations in our briefing in which Complaint Counsel characterizes [REDACTED]. You further proposed that any such references be redacted from the public record.

Outside of this proceeding, [REDACTED] is a matter of public record. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Similarly, in this proceeding, [REDACTED]

Attached to [REDACTED]



[REDACTED]

We do not agree with your suggestion that Complaint Counsel in any way contravened [REDACTED]. Nor does your email of August 13, 2015 explain how information characterizing [REDACTED] would be entitled to protection under Rule 3.45. Additionally, because Respondent has already disclosed the information for which you're seeking protection -- [REDACTED] -- we do not see how Complaint Counsel's inclusion of this fact in our briefing creates any new concerns.

Accordingly, we do not agree to take down Complaint Counsel's post-trial filings. If this does not address the issues raised in your August 13, 2015 email, please do not hesitate to contact me.

Best regards,

Laura

---

**From:** Sherman, William [mailto:william.sherman@dinsmore.com]  
**Sent:** Thursday, August 13, 2015 4:48 PM  
**To:** VanDruff, Laura Riposo  
**Cc:** Brown, Jarad; Rubinstein, Reed; Patrick Massari; Harris, Sunni  
**Subject:** Post Trial Briefings

Laura,

As per our discussion today, we have identified numerous places within your post trial briefings including the Findings of Fact and Post Trial Brief where you describe [REDACTED]. While prior to the filing there were attempts by the parties to rectify this situation by scrubbing the record of [REDACTED], the description of [REDACTED] renders that effort meaningless.

[REDACTED]

Any reader of this public document can easily identify [REDACTED]. We are requesting pursuant to the commission rule 16 C.F.R. 3.45 that you agree to immediately take down your filings and allow us to identify those references that should be redacted from the public record. Please respond in the earliest manner possible as we believe that time is of the essence here. Thank you.

P.S.

I'm told COA is getting calls from law 360 about the filings and want to publish a story. Not sure if they've picked up on this issue or not.

William

**Dinsmore**  
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